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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
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11 MARK HUNGERFORD,

No. CIV S-04-1455-LKK-CMK-P

12 Plaintiff,

13 vs.

FINDINGS AND RECOMMENDATIONS

14 HEROUX, et al.,

15 Defendants.
16 _____/

17 Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant
18 to 42 U.S.C. § 1983. Pending before the court is defendant Heroux's motion to dismiss (Doc.
19 12). Plaintiff filed an opposition (Doc. 13), and defendant Heroux filed a reply (Doc. 14). Also
20 before the court is plaintiff's motion for injunctive relief (Doc. 20).
21

22 **I. BACKGROUND**

23 Plaintiff claims that defendant Heroux, a vocational program instructor, gave an
24 electric dog collar to inmate Humphries to repair. According to plaintiff, inmate Humphries was
25 his cellmate. Plaintiff states that inmate Humphries snuck up behind him and shocked plaintiff
26 with the dog collar. Plaintiff claims that he suffered extreme pain as a result of the shock.

II. APPLICABLE STANDARDS

A. Motion to Dismiss

A motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that plaintiff can prove no set of facts in support of the claim or claims that would entitle him to relief. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); see also Palmer v. Roosevelt Lake Log Owners Ass'n, 651 F.2d 1289, 1294 (9th Cir. 1981). In considering a motion to dismiss under this standard, the court must accept all allegations of material fact as true and must construe them in the light most favorable to the plaintiff. See Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976); see also Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam). All ambiguities or doubts must also be resolved in the plaintiff's favor. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). Pro se pleadings are held to a less stringent standard than those drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972).

To determine whether a complaint states a claim upon which relief can be granted, the court generally may not consider materials outside the complaint and pleadings. See Cooper v. Pickett, 137 F.3d 616, 622 (9th Cir. 1998); Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994). The court may, however, consider: (1) documents whose contents are alleged in or attached to the complaint and whose authenticity no party questions, see Branch, 14 F.3d at 454; (2) documents whose authenticity is not in question, and upon which the complaint necessarily lies, but which are not attached to the complaint, see Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001); and (3) documents and materials of which the court may take judicial notice, see Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994), except prison regulations, see Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir. 1996).

Finally, leave to amend a deficient complaint must be granted “. . . [u]nless it is absolutely clear that no amendment can cure the defects.” See Lucas v. Dep’t of Corrections, 66 F.3d 245, 248 (9th Cir. 1995) (per curiam); see also Lopez v. Smith, 203 F.3d 1122, 1126 (9th

1 Cir. 2000) (en banc).

2 **B. Motion for Injunctive Relief**

3 The legal principles applicable to requests for injunctive relief, such as a
4 temporary restraining order or preliminary injunction, are well established. To prevail, the
5 moving party must show either a likelihood of success on the merits and the possibility of
6 irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in
7 the movant's favor. See Coalition for Economic Equity v. Wilson, 122 F.3d 692, 700 (9th Cir.
8 1997); Oakland Tribune, Inc. v. Chronicle Publ'g Co., 762 F.2d 1374, 1376 (9th Cir. 1985). The
9 two formulations represent two points on a sliding scale with the focal point being the degree of
10 irreparable injury shown. See Oakland Tribune, 762 F.2d at 1376. Under any formulation of the
11 test, however, the moving party must demonstrate that there exists a significant threat of
12 irreparable injury. See id. In the absence of a significant showing of possible irreparable harm,
13 the court need not reach the issue of likelihood of success on the merits. See id. The loss of
14 money, or an injury whose measure of damages can be calculated in terms of money, will not be
15 considered irreparable. See id. at 1334-35.

16 The standard for a temporary restraining order is essentially the same. The
17 purpose in issuing a temporary restraining order is to preserve the status quo pending a more
18 complete hearing. The cases contain limited discussion of the standards for issuing a temporary
19 restraining order due to the fact that very few such orders can be appealed prior to the hearing on
20 a preliminary injunction. It is apparent however, that requests for temporary restraining orders
21 are governed by the same general standards that govern the issuance of a preliminary injunction.
22 See New Motor Vehicle Bd. v. Orrin W. Fox Co., 434 U.S. 1345, 1347 n.2 (1977) (Rehnquist,
23 J.); Los Angeles Unified Sch. Dist. v. United States Dist. Court, 650 F.2d 1004, 1008 (9th Cir.
24 1981) (Ferguson, J. dissenting); Century Time Ltd. v. Interchron Ltd., 729 F. Supp. 366, 368
25 (S.D.N.Y. 1990). In many cases the emphasis of the court is directed to irreparable harm and the
26 balance of hardships because the merits of a controversy are often difficult to ascertain and

1 adjudicate on short notice.

2 Eastern District of California Local Rules impose additional requirements for a
3 motion for a temporary restraining order. First, the court will consider whether the moving party
4 could have sought relief by a noticed motion for a preliminary injunctive at an earlier date
5 without the necessity of seeking last-minute relief by motion for a temporary restraining order.
6 See Local Rule 65-231(b). Second, the moving party must provide specific documents to the
7 court in support of the requested temporary restraining order. See Local Rule 65-231(c).

8 Finally, in cases brought by prisoners involving conditions of confinement, any
9 temporary restraining order or preliminary injunction must be narrowly drawn, extend no further
10 than necessary to correct the harm the court finds requires preliminary relief, and be the least
11 intrusive means necessary to correct the harm. See 18 U.S.C. § 3626(a)(2).

12 13 **III. DISCUSSION**

14 Before addressing the pending motions, the court revisits its January 12, 2005,
15 order which determined that this action was appropriate for service on defendant Heroux. At
16 footnote 1 of the order, the court stated: "Plaintiff failed to clearly connect named defendants
17 Knowles and Lattimore with the alleged denial of his rights and named defendant Glover as
18 deceased." As to defendants Knowles and Lattimore, however, plaintiff was not given leave to
19 amend to allege an adequate causal link. To state a claim under 42 U.S.C. § 1983, the plaintiff
20 must allege an actual connection or link between the actions of the defendants and the alleged
21 deprivations. See Monell v. Dep't of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423
22 U.S. 362 (1976). "A person 'subjects' another to the deprivation of a constitutional right, within
23 the meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts, or
24 omits to perform an act which he is legally required to do that causes the deprivation of which
25 complaint is made." Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Vague and
26 conclusory allegations concerning the involvement of official personnel in civil rights violations

1 are not sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982). Rather, the
2 plaintiff must set forth specific facts as to each individual defendant's causal role in the alleged
3 constitutional deprivation. See Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988).

4 Because it is possible that the deficiency as to defendants Knowles and Lattimore
5 may be cured by amending the complaint, plaintiff is entitled to leave to amend prior to dismissal
6 of the action as against these defendants. The court will, however, recommend dismissal of the
7 action as against defendant Glover, who is deceased.

8 **A. Defendant's Motion to Dismiss**

9 In her motion to dismiss, defendant Heroux argues, in essence, that plaintiff has
10 not alleged sufficient facts to demonstrate a causal link to a constitutional deprivation.
11 Specifically, defendant Heroux asserts that she cannot be held responsible for the "independent,
12 intervening act" of inmate Humphries. In response, plaintiff asserts new facts, apparently for the
13 first time. Specifically, and as characterized by defendant Heroux, plaintiff's new allegations are
14 that "[i]nmate Humphries took an anti-depressant, was in the mental health system, and had
15 violent outbursts." Plaintiff also asserts that defendant Heroux knew about inmate Humphries'
16 problems because he complained to her about them.

17 Defendant Heroux contends in her reply that "[p]laintiff may not correct the
18 deficiencies in his Complaint to opposing a Defendant's Motion to Dismiss." It is true that
19 defendant Heroux's motion challenges the sufficiency of the complaint, and that new factual
20 allegations set forth in opposition do not result in an amendment to the actual complaint.
21 Therefore, looking solely at the complaint whose sufficiency is being challenged, plaintiff has
22 not stated a causal link to defendant Heroux, and the motion to dismiss should be granted.

23 This is not to say, however, that it is absolutely clear that no amendment can cure
24 this defect. In light of the factual allegations asserted by plaintiff in response to defendant
25 Heroux's motion, it appears that there may be facts to support the claim. Specifically, plaintiff
26 now asserts that defendant Heroux knew about inmate Humphries' problems. The reasonable

inference to be drawn from this allegation is that defendant Heroux should have known about the safety risk posed to plaintiff by giving inmate Humphries the shock collar. Therefore, plaintiff should be given an opportunity to amend the complaint to include these factual allegations.

B. Plaintiff's Motion for Injunctive Relief

In his motion, plaintiff states that he seeks a temporary restraining order and preliminary injunction prohibiting "defendants, their successors in office, agents and employees, and all other persons acting in concert and participation" with them from engaging in retaliatory conduct against plaintiff. Specifically, plaintiff seeks an order enjoining transfer to another prison. To the extent plaintiff seeks injunctive relief against individuals who are not named as defendants to this action, the request must be denied. This court is unable to issue an order against individuals who are not parties to a suit pending before it. See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 112 (1969).

To the extent plaintiff seeks relief against named defendants, plaintiff has not demonstrated the threat of irreparable injury. Plaintiff states that, if he is transferred, his ability to pursue state court litigation will be hampered. He does not, however, state how. Moreover, even if plaintiff is transferred and his access to the courts is hampered, any resulting injury is not irreparable given that plaintiff would have recourse in the courts. Finally, plaintiff has not demonstrated a likelihood of success on the merits of this action, or that there are serious questions going to the merits. For these additional reasons, the request for injunctive relief should be denied.¹

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¹ Plaintiff's request for a hearing on his motion for injunctive relief (Doc. 21), and request to amend his motion for injunctive relief (Doc. 22), will be moot if this recommendation is adopted.

Based on the foregoing, the undersigned recommends that:

1. Plaintiff's motion for injunctive relief be denied;
2. Plaintiff's requests for a hearing (Doc. 21), and request to amend his motion for injunctive relief (Doc. 22), be denied as moot;
3. Defendant Glover, who is deceased, be dismissed from the action;
4. Defendant Heroux's motion to dismiss be granted;
5. The complaint be dismissed, with leave to amend; and
6. Plaintiff be directed to file an amended complaint.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days after being served with these findings and recommendations, any party may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: November 8, 2005.


CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE